

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JANET HAYNIE)	
Claimant)	
VS.)	
)	Docket Nos. 231,698 & 231,699
LIPTON COMPANY)	
Respondent)	
AND)	
)	
NATIONAL UNION FIRE INSURANCE CO.,)	
c/o AMERICAN INTERNATIONAL GROUP)	
Insurance Carrier)	

ORDER

Claimant appealed the May 19, 2000 Award entered by Administrative Law Judge Robert H. Foerschler. The Appeals Board heard oral argument on October 18, 2000.

APPEARANCES

Dale E. Bennett of Westwood, Kansas, appeared for claimant. Brian J. Fowler of Kansas City, Missouri, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award, with the following exception. Contrary to the Award, timely written claim was denied in Docket #231,698 but admitted in Docket #231,699.

ISSUES

Docket #231,698 is a claim for a June 16, 1997 accident and alleged injuries to the neck and low back. Docket #231,699 is a claim for a February 23, 1998 accident and an alleged aggravation to the neck and low back. In the May 19, 2000 Award, which is the subject of this appeal, Judge Foerschler denied claimant's request for benefits in both claims. In the first claim, the Judge determined that claimant had failed to provide respondent with timely notice of the June 16, 1997 accident. In the second claim, the reason for denying benefits is unclear.

Claimant contends Judge Foerschler erred. Claimant argues that she gave respondent timely notice of both accidents and, therefore, the Judge should have awarded her benefits.

Conversely, respondent and its insurance carrier contend that the Award should be affirmed. They argue that (1) claimant failed to prove that she sustained a compensable accident on either of the alleged dates, (2) claimant failed to prove that she provided respondent with timely notice of either accident, (3) claimant's present functional impairment predates both alleged accidents, and (4) if there is an award for permanent partial disability benefits, it should be limited to the functional impairment rating as claimant refused respondent's offer of an accommodated job and claimant has made no effort to find work after leaving respondent's employment.

The issues before the Appeals Board on this review are:

Docket #231,698

1. On June 16, 1997, did claimant sustain personal injury by accident arising out of and in the course of employment with respondent?
2. Did claimant provide respondent with timely notice of the accident or injury?
3. Did claimant make timely written claim for benefits?
4. What is the nature and extent of claimant's injuries and disability?
5. How many weeks of temporary total disability benefits, if any, is claimant entitled to receive?
6. What medical benefits, if any, is claimant entitled to receive?
7. Is there any offset for the Social Security disability or company-provided disability benefits that are being paid to claimant?

Docket #231,699

8. On February 23, 1998, did claimant sustain personal injury by accident arising out of and in the course of employment with respondent?
9. Did claimant provide respondent with timely notice of the accident or injury?
10. What is the nature and extent of claimant's injuries and disability?
11. How many weeks of temporary total disability benefits, if any, is claimant entitled to receive?

12. What medical benefits, if any, is claimant entitled to receive?
13. Is there any offset for the disability benefits being paid to claimant?

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

1. At the time of regular hearing, claimant was 48 years old and had worked for respondent and its predecessors for 19 years. At the time of both alleged accidents, June 16, 1997, and February 23, 1998, claimant was working as a microbiologist and laboratory technician.
2. Claimant testified that on June 16, 1997, she slipped and fell, hitting her head and back on the floor. Claimant also testified that she immediately notified both the syrup plant supervisor, whom she identified as Rodrigo, and her immediate supervisor, David Neo, about the accident. Claimant believes she discussed the accident with both respondent's human resources manager, Connie Ferris-Nelson, in June and July 1997 and the plant manager, Robert Wayman, in December 1997. Additionally, claimant believes that she noted the accident in a log book that was kept in the laboratory.
3. Despite the alleged June 1997 accident, claimant continued working for respondent. In October 1997, claimant missed some work due to her symptoms and then began working half-days. In December 1997, claimant was off work but was drawing short-term disability.
4. Claimant returned to work for respondent on February 23, 1998, and alleges on that date that she aggravated her neck and low back by climbing stairs to several tanks to obtain a sample on a cotton swab. Claimant continued to work for several days through approximately March 3, 1998. Claimant then left work and began receiving short-term disability benefits through June 1998, when it converted to long-term disability. At the time of the February 2000 regular hearing, claimant was receiving \$800 per month in long-term disability benefits provided through respondent and \$1,180 per month in Social Security disability benefits.
5. In June 1998, respondent offered claimant an accommodated job, but claimant declined it as she believed she could not work as her condition was worsening. Claimant has not looked for any work since leaving respondent's employment. Claimant contends that her condition has worsened despite being off work.
6. David Neo denied that claimant timely notified him of the alleged June 1997 accident. Additionally, both Connie Ferris-Nelson and Robert Wayman denied that claimant advised them of the June 1997 accident and that they were not aware of the alleged accident until early in 1998 when respondent received a letter from claimant's attorney. Further, pages from the laboratory log book in which claimant allegedly noted her June 16, 1997 accident were

introduced into evidence. The entries from June 16, 17, and 18, 1997, fail to mention that claimant slipped and fell or sustained any other type of accident on June 16, 1997.

7. Before the alleged June 1997 accident, claimant had experienced headaches, neck and back pain for a number of years. And claimant's supervisors were very much aware of her ongoing symptoms. Claimant's immediate supervisor, David Neo, testified that before June 1997 claimant often complained of backaches and headaches and that he regularly allowed her to leave work early to see her chiropractor.

8. According to the medical records introduced into evidence and the testimony presented, claimant reported neck and back pain to her family physician, Dr. Buie, following a September 1986 automobile accident. In 1994 and 1995, Dr. Satish Bansal, an orthopedic surgeon, treated claimant's low back and diagnosed spondylolysis and spondylolisthesis. In June 1995, Dr. Bansal gave claimant a ten-pound lifting restriction and recommended that she avoid prolonged standing and prolonged ascending and descending stairs. In August 1995, Dr. Buie again diagnosed cervical and lumbar strain after claimant had been involved in a second automobile accident.

9. Records from claimant's chiropractor, Dr. Yoder, indicate that claimant had middle and low back pain in June 1993. Claimant saw Dr. Yoder regularly following the second automobile accident from August 1995 through April 21, 1997, for neck and low back complaints. Claimant also complained of numbness in the left hand, arm, and left foot. Dr. Yoder's records from June 16, 1997, indicate a fall from slipping in which claimant landed on her left side and that claimant was complaining of headaches. In November 1997, claimant saw Dr. George R. Moreng, a neurologist, who recorded a history that claimant had experienced head, shoulder, and neck pain for the past three years. Claimant did not tell Dr. Moreng about the alleged June 1997 accident.

10. In November 1997, claimant began seeing a different chiropractor, Dr. Zak. The history noted by Dr. Zak indicates that claimant had migraine headaches, neck, and shoulder pain every day for one year with an insidious onset. In documents prepared in Dr. Zak's office, claimant indicated that her condition was not caused by a work-related injury.

11. According to claimant's medical expert witness, Dr. Zita Surprenant, claimant also claims to have fallen and injured herself in 1990 while working for respondent.

12. Likewise, claimant has a long history of headaches. In December 1994, claimant complained to one of her doctors that she had headaches and fatigue. In August 1995, Dr. Yoder noted that claimant had headaches. In October 1996, Dr. Buie noted that claimant had bitemporal, throbbing headaches that interfered with her sleep. At that time, claimant was prescribed anti-inflammatory medications, including Relafen, which she was taking daily. Dr. Buie's February 1997 office notes indicate that claimant's headaches were continuing despite taking Ultram and Imitrex (which is medication prescribed for vascular-induced headaches and classic migraines). Dr. Buie's July 1997 notes fail to note a June 1997 accident but do

note that claimant had experienced daily headaches that were worse after her hysterectomy (which was apparently performed in 1994).

13. Claimant saw Dr. Nussbaum in late 1997 for an MRI. Dr. Nussbaum's notes indicate that claimant had experienced headaches for three years and on a daily basis since December 1996. Claimant testified that she did not tell Dr. Nussbaum about the alleged June 1997 accident because, at that time, she did not associate the accident with the headaches. Likewise, claimant failed to relate her headaches to the alleged June 1997 accident when she saw Dr. Zak in November 1997, as noted above.

14. On December 9, 1997, claimant sent an E-mail to David Neo, Connie Ferris-Nelson, and Robert Wayman. That document stated that respondent should prepare an accident report for the approximately three times that claimant had fallen at work and for the carpal tunnel syndrome in her wrist. The document indicated that claimant had been ill for more than a year with headaches, dizziness and feeling faint. The document also indicated that claimant had told David Neo and Rodrigo about the falls.

15. On February 24, 1998, claimant sent an E-mail to David Neo that stated she could not climb the stairs to cotton-swab the tanks as it affected her back. Claimant also stated in that document that her back and leg had not bothered her for almost a year.

CONCLUSIONS OF LAW

1. For the reasons below, the Award denying benefits should be affirmed.

2. Considering the entire record, the Board concludes that claimant failed to provide respondent with timely notice of the alleged June 16, 1997 accident. The Board is persuaded by the testimonies of David Neo, Connie Ferris-Nelson, and Robert Wayman that claimant did not provide them timely notice of the June 1997 accident or the alleged injuries. Claimant did not give a history of a work-related accident or relate her symptoms to such an accident when she saw Dr. Buie in July 1997, Dr. Nussbaum in late 1997, or Dr. Zak in November 1997. Comparing claimant's testimony regarding her medical history and symptoms to the information actually contained in her medical records, the Board finds claimant's testimony is not credible. The Board concludes claimant's testimony regarding notice to respondent of the alleged June 1997 accident is not persuasive and, therefore, does not satisfy her burden of proof.

3. The Workers Compensation Act requires workers to give notice of their accident or injury within ten days of when it occurred. But that ten-day period may be extended to 75 days if the worker can prove that the failure to notify the employer within the initial ten-day period was due to just cause. The employer's actual knowledge of the accident or injury renders the

giving of such notice unnecessary.¹ The Act also provides that a worker's failure to provide the employer timely notice precludes the worker from receiving any benefits. Because claimant has failed to prove that she provided respondent with timely notice of the accidental injury, the request for benefits in Docket #231,698 should be denied.

4. The Appeals Board concludes that claimant has failed to prove that she sustained permanent injury or permanent impairment as the result of the alleged February 23, 1998 accident. Claimant contends that walking up a limited number of stairs on that date either permanently injured or aggravated both her neck and low back. The Board is persuaded by the testimony of Dr. David A. Tillema, an orthopedic surgeon, that walking up and down stairs would be quite unlikely to cause injury. The Board concludes that walking up and down the stairs at work on February 23, 1998, may have caused a temporary flare-up of symptoms but such activity did not cause either a permanent injury or permanent aggravation. Therefore, in Docket #231,699 the request for permanent partial disability benefits should be denied. Additionally, the request for medical benefits in that docket number should be denied as the evidence fails to prove the treatment that claimant received following the alleged February 23, 1998 incident was related to that alleged accident as opposed to treatment for the preexisting conditions in claimant's neck and low back or the natural progression of those conditions.

5. The Board adopts the findings and conclusions set forth in the Award that are not inconsistent with the above.

AWARD

WHEREFORE, the Appeals Board affirms the May 19, 2000 Award entered by Judge Robert H. Foerschler.

IT IS SO ORDERED.

Dated this ____ day of December 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

¹ K.S.A. 44-520.

c: Dale E. Bennett, Westwood, KS
Brian J. Fowler, Kansas City, MO
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director